Supreme Court, U.S.
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No. 99-1030

In The

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, and BART PETERSON, in his official capacity as Mayor of the City of Indianapolis, Indiana,

Petitioners,

v.

JAMES EDMOND and JOELL PALMER, on their own behalf and on behalf of a class of those similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. INDIVIDUALIZED SUSPICION IS REQUIRED WHENEVER THE GOVERNMENT'S OBJECTIVE IN A SEIZURE IS THE INVESTIGATION OF CRIME 5

A. Alien Checkpoints Secure National Borders 7

B. Sobriety Checkpoint Remove Potentially Deadly Drivers from the Highway 10

C. Drug Checkpoints Prosecute the Criminal Act of Possession 11

II. A MOTORIST MAY NOT BE SUBJECTED TO A DOG SNIFF ABSENT REASONABLE SUSPICION 12

A. A Dog Sniff is a Show of Force Requiring a Quantum of Suspicion 13

B. The Inaccuracy of Dog Sniffs on a Random Population Demonstrates that Dog Sniffs Absent Reasonable Suspicion Yields an Intolerable Number of False Positives 15

TABLE OF CONTENTS – Continued

C. Many State Courts and Commentators Have Called for a Showing of Reasonable Suspicion Before a Dog Sniff is Permitted 18

III. THE INDIANAPOLIS ROADBLOCK DOES NOT ADEQUATELY LIMIT THE DISCRETION OF POLICE OFFICERS 20

A. The Directives Do Not Adequately Limit the Extent or Manner of Investigation Officers May Perform at the Checkpoint 21

B. The Directives Do Not Adequately Limit the Discretion of Law Enforcement Officials Determining Where the Roadblock Shall Be Placed 23

CONCLUSION 26

TABLE OF AUTHORITIES

CASES:

Almeida-Sanchez v. United States, 413 U.S. 266 (1978) 9

B.C. v. Plumas Unified School District,
192 F.3d 1260 (9th Cir. 1999) 3, 17

Brown v. Texas, 460 U.S. 730 (1983) 6

Cady v. Dombrowski, 431 U.S. 433 (1973) 10

Camara v. Municipal Court, 387 U.S. 523 (1967) . 22, 23, 25

Carroll v. United States, 267 U.S. 132 (1925) 2, 9

Chandler v. Miller, 520 U.S. 305 (1997) 2, 5, 12

Commonwealth v. Johnston, 530 A.2d 74 (Pa. 1987) 19

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 23

Delaware v. Prouse, 496 U.S. 444 (1979) 3-4, 20, 24

Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979),
aff'd in part and remanded in part, 631 F.2d 91
(7th Cir. 1980) 17

Illinois v. Wardlow, 120 S.Ct. 673 (2000) 15

I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) 9-10

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 23, 25

Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995) 3, 16

TABLE OF AUTHORITIES – Continued

Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 10-11, 20

Michigan v. Tyler, 436 U.S. 499 (1978) 6

National Treasury Employees Union v. Von Raab,
489 U.S. 656 (1989) 16, 18

New York v. Burger, 482 U.S. 691 (1987) 22

People v. Unruh, 713 P.2d 370 (Colo. 1986) (*en banc*) . . . 18

Pooley v. State, 705 P.2d 1293 (Alaska App. 1985) 18

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 21

Skinner v. Railway Labor Exec. Assoc.,
489 U.S. 602 (1989) 5, 11

South Dakota v. Opperman, 428 U.S. 364 (1976) 6

State v. Pellici, 580 A.2d 710 (N.H. 1990) 18

United States v. Buchanon,
72 F.3d 1217 (6th Cir. 1995) 3, 13, 14

United States v. Edwards,
489 F.2d 496 (2d Cir. 1974) 16, 18

United States v. Gigley, 213 F.3d 509 (10th Cir. 2000) . . . 23

United States v. Martinez Fuerte,
428 U.S. 543 (1976) 9

TABLE OF AUTHORITIES – Continued

United States v. Montoya de Hernandez,
473 U.S. 531 (1985) 9

United States v. McRae, 81 F.3d 1528 (10th Cir. 1996) . . . 23

United States v. Pena, 920 F.2d 1509 (10th Cir. 1990) 23

United States v. Place, 462 U.S. 702 (1983) 13, 14

United States v. Ramsey, 431 U.S. 606 (1977) 8

United States v. Thirty-Seven Photographs,
402 U.S. 363 (1971) 9, 16

United States v. Zapata,
180 F.3d 1237 (11th Cir. 1999) 22-23

STATUTES:

Collections Act of 1789, Ch. 5, 1 Stat. 29 7

MISCELLANEOUS AUTHORITY:

Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*,
85 Ky. L. J. 405 (1996-97) 15, 17

Consent Decree, *United States v. New Jersey* (D.N.J.)
(Civ. No. 99-5970-MLC) (visited May 21, 2000)
<http://www.usdoj.gov/crt/split/documents/jerseya.
htm> 12

TABLE OF AUTHORITIES -- Continued

Morgan Cloud, *Searching Through History, Searching for History*, 63 U. Chi. L. Rev. 1707 (1996) 8

William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (1990) 7

Wayne R. LaFave, *Criminal Law* (3d ed. 2000) . . . 12, 17, 18

David Benjamin Oppenheimer, *Kennedy, King, Shuttleworth and Walker: The Events Leading to the Civil Rights Act of 1964*, 26 U.S.F. L. Rev. 645 (1995) 15

Kenneth L. Pollack, Note, *Stretching the* Terry *Doctrine to the Search for Evidence of a Crime: Canine Sniffs State Constitutions and the Reasonable Suspicion Standard*, 74 Vand. L. Rev. 803 (1994) 19-20

Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19 (1988) 24

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a professional bar association founded in 1958 for the purpose of advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of a crime or other misconduct. Today, the NACDL has almost 10,000 direct members and 80 affiliates representing another 28,000 members, who include private criminal defense lawyers, public defenders, active U.S. military defense counsel and law professors. NACDL has members in all fifty states, and the American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. AFD is a nationwide, non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices.

Among NACDL's and AFD's objectives is to deter overreaching by law enforcement officers by vigorously defending the protections guaranteed by the Constitution. NACDL and AFD believe that this case may have a significant impact on the power of law enforcement personnel to intrude upon the lives of citizens it has no reason to suspect of any wrongdoing. Accordingly, NACDL

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[1] Both parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in party, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

and AFD file this brief in support of the Respondent to urge this Court to hold that a seizure for the purpose of criminal investigation requires an officer to first suspect the person to be seized is engaged in criminal wrongdoing. Further, NACDL and AFD urges this Court to recognize that the use of police dogs to test for the presence of narcotics on persons and property is a show of official force that often leads to false positives and therefore fruitless searches. To guard against what the decisions in the lower courts reveal to be an intolerable number of searches resulting from false positives by narcotics detection dogs, NACDL and AFD urge this Court to limit canine sniffs to situations where officers have reasonable suspicion to believe narcotics present.

SUMMARY OF ARGUMENT

In 1925, this Court announced that a roadblock to determine whether motorists were in possession of contraband alcohol would be an unreasonable seizure. *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). "It would intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*

Fourth Amendment decisions since *Carroll* have reaffirmed that a roadblock to investigate the possibility motorists are committing a crime would be intolerable. This Court has recently recognized that a search or seizure is permitted only where the state has individualized suspicion of criminal wrongdoing or an important purpose other than prosecuting criminal wrongdoing. *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997).

The roadblock in the instant case seizes every motorist absent any suspicion of wrongdoing to investigate the possibility the motorist is violating a criminal statute. The directives to officers in the Indianapolis roadblock indicate that the positive indication by the drug dog is but one way a full automobile search may occur. Probable cause may be developed independent of the dog sniff and officers may obtain consent to search the cars. No limits are placed on the types of questions that may be asked to obtain probable cause or the statements that may be used to prompt consent.

Even if the dog alert alone permitted a search of the automobiles stopped at this roadblock, the reliability of drug dogs on a random population is, at best, suspect. Cases litigated in the lower courts reveal that when dogs are asked to inspect those whom officers have no articulable basis to suspect, false positives can exceed 96 percent. *Merrett v. Moore,* 58 F.3d 1547, 1549 (11th Cir. 1995); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1263 (9th Cir. 1999).

A police dog is a show of force exceeding that required at a stop to ensure licensure or sobriety. *See United States v. Buchanon*, 72 F.3d 1217, 1225 (6th Cir. 1995) (recognizing that running a drug dog on a disabled car police were about to assist was a show of force requiring reasonable suspicion). The drug interdiction roadblock using a narcotics detection dog on every car is therefore a greater intrusion upon a motorist than a checkpoint to achieve the regulatory goals of ensuring motorists are licensed and sober. Even where the drug dog does not indicate the presence of narcotics, subjecting each citizen to a compelled intrusion aimed at his prosecution subjects him to this show of force unjustified by any suspicion.

Finally, a roadblock must limit the discretion of law enforcement officials responsible for its operation. *Delaware*

v. Prouse, 440 U.S. 648, 657 (1979). The Indianapolis drug checkpoint does not provide guidelines that tell an officer when he may seek consent to search a car -- though the directives inform the officer that he may seek consent to search a vehicle. The directives tell the officer he may search a car on probable cause but do not limit his attempt to obtain probable cause nor do they provide for a standard set of questions to ask all motorists. The type of interrogation an officer performs in his effort to obtain probable cause or consent can vary widely from motorist to motorist. The location of the roadblock is left to the decision of the police who are directed to assess crime rates in determining where the roadblocks shall be placed. Police are therefore afforded too much discretion to subject one portion of the community to an intrusion not visited on more affluent, more influential sections.

ARGUMENT

I. INDIVIDUALIZED SUSPICION IS REQUIRED WHENEVER THE GOVERNMENT'S OBJECTIVE IN A SEIZURE IS THE INVESTIGATION OF CRIME.

The stated purpose of the roadblock is to discover those committing the criminal offense of possession of narcotics. The directives to officers operating the roadblock describe the seizure as a "drug checkpoint." Drug Checkpoint Officer Directives, App. of Pet. Brief, 53a. The City of Indianapolis further admits in its brief that the purpose of the roadblock is criminal investigation. "To be sure, the City uses checkpoints to enforce the law." *See* Brief of Petitioner at 16. A drug dog circles each stopped vehicle to determine whether a seized motorist is in *possession* of contraband. Directives, ¶ 8, App. of Pet. Brief at 54a. The drug dog does not, as indeed it could not, determine whether the motorist is under the influence of an unlawful substance. The dog alerts only to the criminal act of possession -- an act that neither poses a public safety concern to those on the highway nor is the subject of civil regulation. *See Skinner v. Railway Labor Exec. Assoc.*, 489 U.S. 602, 633 (1989) (recognizing distinction between prosecutorial interest in discovering drug possession and public safety interest in discovering incidents of drug use by those in dangerous professions).

Absent suspicion of criminal wrongdoing, a search or seizure may not be conducted for the purpose of discovering evidence of a crime. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individual suspicion of wrongdoing." *Chandler v. Miller*, 520 U.S. 305, 313 (1997). The only exceptions to this rule occur when the government seeks goals "beyond the normal need for law

enforcement." *Id.* *See also Michigan v. Tyler,* 436 U.S. 499, 512 (1978); *Brown v. Texas,* 460 U.S. 730, 743 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976).

In several contexts this Court has recognized that intrusions without suspicion of wrongdoing must be justified by a goal other than the investigation of crime. In *Opperman*, this Court recognized that the police may inventory impounded automobiles "where the process is *aimed* at securing or protecting the car and its contents." *Id.* at 373 (emphasis added). Standardized procedures are required to assure that inventory searches are "limited in scope to the extent necessary to carry out the caretaking function" and not become "a pretext concealing an investigatory police motive." *Id.* at 375, 376. "Inventory searches... are not conducted in order to discover evidence of a crime." *Id.* at 383 (Powell, J., concurring).

Similarly, in *Brown* this Court permitted the introduction of evidence discovered in a roadblock to ensure that all motorists are licensed. The Court recognized, however, that there was "no suggestion that the roadblock was a pretext whereby evidence of narcotics might be uncovered in 'plain view.'" *Id.* at 743.

This Court in *Tyler* recognized that firefighters may investigate the origins of a fire to prevent further danger to persons or property absent probable cause of any wrongdoing. *Id.* at 510. A warrant is required to reenter a burned building after the blaze has been extinguished, but the magistrate issuing the warrant need only be assured that the intrusion is reasonably tailored to locating the origin of the fire, no suspicion of wrongdoing is required. *Id.* This Court, however, held that if firefighters wish to search for evidence of arson, or evidence linking an individual to an act of arson, probable cause would be required. *Id.* at 511-12.

Roadblocks, suspicionless seizures of automobiles, have been permitted where the government has been able to identify a goal separate from criminal enforcement, a valid public interest that is immediately served through the roadblock itself. Specifically, this Court has permitted a roadblock to ensure the integrity of international borders and to ensure the safety of the motoring public. These exceptions are consistent with the Court's recognition that when "concerns other than crime detection . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

A. Alien Checkpoints Secure National Borders.

The Framers recognized a distinction between border, or customs, searches and searches designed to discover evidence of wrongdoing. The Collections Act of 1789, Ch. 5, 1 Stat. 29,[2] provided in part for the mechanisms by which a ship could be searched. The First Congress considered these provisions of the Collections Act twelve days before James Madison presented the first version of what became the Fourth Amendment to the House of Representatives. The Act passed three weeks before Congress' final revision of the Amendment. William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791*, 1491 (1990).[3] "The Collections Act explicated the Fourth Amendment, for both documents expressed the thoughts of the same persons on the same subjects." *Id.* at 1491-93.

The Collections Act made a distinction between a search to determine the nature of goods entering the country

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[2] Repealed by Act of August 4, 1790, ch. 35, § 74, 1 Stat. 145, 178

[3] Unpublished Ph.D. dissertation available from UMI Dissertation Services, 300 N. Zeeb Road, Ann Arbor, Michigan 48106.

by ship and a search for evidence of wrongdoing aboard ship. The Act permitted officers "of any port of entry or delivery, at which any ship or vessel may arrive to put [inspectors] on board" who shall specify "the marks and numbers of each package, and a description thereof." *Id.* at § 15, 1 Stat. at 40. The Act, however, in a separate section permitted officers to conduct a warrantless search of a vessel only when they had "reason to suspect any goods, wares or merchandise subject to duty shall be concealed." *Id.* at § 24, 1 Stat. at 43.

A quantum of suspicion to search for evidence of wrongdoing was required to search even at the border while an inventorying of items entering the border could proceed absent suspicion. "The statute distinguished these administrative acts from searches of ships that were triggered by a belief that dutiable goods were being concealed to avoid payment of taxes." Morgan Cloud, *Searching Through History; Searching for History*, 63 U. Chi. L. Rev. 1707, 1740-41 (1996). Further, as this Court has recognized, this statute is the first enactment of a long-recognized "right of the sovereign to protect itself by examining persons and property crossing into this country." *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

> [A] port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search. Customs officials characteristically inspect luggage . . . it is an old practice intimately associated with excluding illegal articles from the country.

United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971). *See also United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985) ("the Fourth

Amendment balance between the interests of the Government and the privacy rights of the individual is struck much more favorably to the Government at the border"); *Carroll v. United States*, 267 U.S. 132, 154 (1925) (recognizing unique interest of federal government at the border).

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), this Court permitted a roadblock fifty miles from an international border to discover illegal aliens. The protection of the integrity of national borders is a function of government the Framers recognized was not limited by the usual pre-requisites to a search or seizure, a warrant and probable cause. As the United States has previously argued, the search for aliens is essentially a regulatory or administrative search as criminal prosecution is not the goal of the search, rather it is an interest in maintaining the integrity of its borders -- an interest the government vindicates most often without resort to the criminal process. *Almeida Sanchez v. United States*, 413 U.S. 266, 278 (1978) (Powell, J., concurring).

> The government further argues that [roving automobile searches in border regions for aliens] . . . are undertaken for administrative rather than prosecutorial purposes, that their function is simply to locate those who are illegally here and to deport them.

Id.

As this Court has recognized, the goal of discovering illegal aliens is civil deportation -- the possibility of criminal prosecution is rarely implemented. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984). "[O]nly a very small percentage of arrests lead to criminal prosecutions. Thus the arresting officer's primary objective, in practice, will be to use the [arrestee's post-arrest statements] in the civil

deportation hearing." *Id.* This type of roadblock therefore immediately served the regulatory goal of identifying those unlawfully in this country and commenced the process of their removal.

B. Sobriety Checkpoints Remove Potentially Deadly Drivers from the Highway

This Court has held that when officers act to protect the safety of the community, rather than investigate crime, the usual standards of suspicion are not prerequisites to a legitimate intrusion. For example, in *Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973), this Court recognized that officers acting to protect the public, as opposed to investigating crime, are performing community caretaking functions. In *Cady*, an officer entered the trunk of a disabled car towed to a garage as he believed the motorist, a Chicago police officer, was required to carry his service revolver at all times. *Id.* at 437. The officer checked the trunk to ensure the weapon he thought to be in the trunk would not be discovered by vandals once the car was impounded. *Id.* at 448. This Court held that when officers are performing community caretaking functions, such as protecting the public from weapons falling into the hands of criminals, the typical requirement of individual suspicion is not a prerequisite to the action.

Ensuring motorists are sober and therefore not posing a lethal threat to their fellow motorists is surely part of an officer's duty to protect the community. In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), this Court permitted a roadblock to ensure that motorists were sober. The Court, in allowing the roadblock, weighed the state's interest in preventing the carnage caused by drunk drivers against the

minimal intrusion caused by the thirty second stop at a checkpoint. *Id.* at 451.

Certainly drunk driving is a crime and arrests were made for drunk driving at the roadblock considered in *Sitz*. *Id.* at 448. The State's interest in exacting possible sanction for driving under the influence, however, pales in comparison to the State's interest in removing drunk drivers from the highway before their impairment causes tragic, often fatal, accidents. Not unlike the interest advanced in *Martinez Fuerte*, the criminal component of the state's interest is ancillary to a regulatory goal -- here, the community caretaker function of making the highways safe.

C. Drug Checkpoints Prosecute the Criminal Act of Possession.

This Court has previously distinguished the regulatory interest in discovering those *using* drugs in dangerous occupations from the investigation of the crime of possessing drugs. For example, in permitting mandatory drug testing for railroad engineers previously involved in train accidents, this Court noted "the possession of unlawful drugs is a criminal offense that the Government may punish, but it is a *separate* and *far more dangerous* wrong to perform certain sensitive tasks while under the influence of those substances." *Skinner v. Railway Labor Exec. Assoc.*, 489 U.S. 602, 633 (1989) (emphasis added).

The purpose of the Indianapolis roadblock is the detection of those in *possession* of unlawful drugs. *See* Directives, App. of Pet. Brief, 53a.. The identification of those in possession of contraband narcotics commences the criminal charging process for this offense. Individual suspicion is therefore required for the seizure as the

governmental interest is sought through the drug interdiction checkpoint. *Chandler,* 520 U.S. at 513-14.

The United States, as *amicus curiae*, argues that the discovery of drug traffickers prevents further criminal acts by these individuals and other, particularly the distribution of drugs. Brief of the United States at 12 n.4. Incapacitation of the offender so that he may not commit further crimes against society and deterring others from doing the same are, however, two of the goals of criminal prosecution in all cases. *See* Wayne R. LaFave, *Criminal Law*, § 1.5(a), 24-25 (3d ed. 2000). The desire to prevent future crimes by those discovered to have committed one crime -- and the desire to prevent crimes by others -- does not therefore demonstrate an interest beyond that inherent in every criminal prosecution.

When the state seeks to intrude upon a citizen with no reason to believe him involved in wrongdoing, it is consistent with this Court's doctrines (and common sense) that the state only be allowed to do so when it is not subjecting him to a process that has as its aim his incarceration.

II. A MOTORIST MAY NOT BE SUBJECTED TO A DOG SNIFF ABSENT REASONABLE SUSPICION.

In a consent decree to eradicate racial profiling on the New Jersey Turnpike, the United States Department of Justice and the New Jersey State Police agreed that dog sniffs would be used on cars lawfully stopped only where there was a *basis* for using the dog. *See* Consent Decree, *United States v. New Jersey,* ¶¶ 32-33 (D.N.J.) (Civ. No. 99-5970 MLC) (visited May 21, 2000)<http://www.usdoj.gov/crt/split/documents/jerseya.htm>.

If the dog sniff were of no moment, as the City of Indianapolis and the United States assert, *see* Brief of Petitioner at 19; Brief of United States at 15; adding nothing to a detainee's uneasiness and posing no substantial risk of a false positive, this provision would unnecessarily inhibit law enforcement. That the New Jersey State Police and the United States Department of Justice agreed to this term is an implicit recognition of one of two important truths (and perhaps both). Dog sniffs subject the citizen to the state's machinery of criminal investigation which is an offensive act to a citizen not free to walk away. And dog sniffs pose a substantial risk of false positives resulting in fruitless and very invasive searches undermining a citizen's reasonable expectation of privacy and dignity.

A. A Dog Sniff is a Show of Force Requiring a Quantum of Suspicion.

A police dog at a roadblock adds a degree of official force and intimidation not present where officers merely check license and registration and ensure the driver is sober. Indeed, the Sixth Circuit has held that bringing a narcotics detection dog to the scene of a disabled car is a "show of force" indicating to a reasonable person that a drug investigation is underway with which the motorist may not interfere. *United States v. Buchanon*, 72 F.3d 1217, 1225 (6th Cir. 1995).

This Court has never authorized the use of a narcotics detection dog on property still in the lawful possession of someone authorities have no reasons to suspect of wrongdoing. In *United States v. Place*, 462 U.S. 702, 709 (1983), this Court held that a suspect's luggage had been detained by authorities for such a substantial length of time

that probable cause was required for the detention. The Court then recognized that a shorter detention of the luggage could be supported by a showing of reasonable suspicion, provided that the investigation performed on the detained luggage was "properly limited in its scope." *Id.* at 706.

It was in this context, where the police have a basis for separating a traveler from his luggage, that this Court noted that a dog sniff added nothing to the intrusion visited upon a suspect. *Id.* at 707. This Court did not say that property in the lawful possession of its owner may be sniffed at any time.

Bringing a police dog to an otherwise legitimate suspicionless encounter between an officer and citizen changes the legal nature of the encounter. In *Buchanon*, officers encountered the motorist as part of their efforts to assist him with his car trouble -- a legitimate basis for a suspicionless encounter of the officers with the motorist. The Sixth Circuit recognized, however, that directing a drug dog to sniff the disabled vehicle was an investigation of the motorist's property -- an investigation with which he may not interfere. *Buchanon*, 72 F.3d at 1225. "Bringing out the dog was a show of force . . . and when the sniff began, it would have been clear to a reasonable person that a drug investigation was underway and that troopers would not permit access to the vehicle during the dog sniff." *Id.* The Court held this show of force, during a function the officers doubtless had the right and responsibility to perform -- assisting a disabled motorist -- requiring reasonable suspicion. *Id.*

Whether the narcotic detection dog is viewed by the motorist as investigating him for criminal violations or a powerful show of the officer's authority and power, the police dog is clearly a sign of police power adverse to the motorist. When the purpose of the seizure is to investigate

the possibility he is committing a crime, the motorist is aware that he is treated as a suspect, that he is under a microscope where officer look for factors that suggest criminal activity sufficient to justify a search. And the investigative technique of a dog sniff demonstrates the officer's immediate physical authority not unlike his hand on a weapon.

Those who because of race, ethnicity, class, or prior unpleasant encounters with police have come to distrust the police would find this examination even more offensive and frightening. *See Illinois v. Wardlow*, 120 S.Ct. 673, 680-81 (2000) (Stevens, J., dissenting)(noting reasonable fear of the police by some segments of the community, particularly racial minorities). The vision of police dogs being let loose on civil rights marchers in Birmingham, Alabama is an image burned into the American conscience. *See* David Benjamin Oppenheimer, *Kennedy, King, Shuttleworth and Walker: The Events Leading to the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645, 671 (1995) (noting use of police dogs against marchers in Birmingham). This sad chapter in American history taints the current use of police dogs and instills fear in those who cannot forget the way these dogs have been used. The police dog simply is not a source of comfort to an innocent motorist seized in an official roadblock -- it is a show of force, a demonstration of the immediate physical power at the officers' disposal -- a power that history reminds us has not always been responsibly used.

B. The Inaccuracy of Dog Sniffs on a Random Population Demonstrates that Dog Sniffs Absent Reasonable Suspicion Yield an Intolerable Number of False Positives.

A narcotics detection dog is particularly unreliable when asked survey a random population. *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L. J. 405, 430 (1996-97).

This Court's has yet to authorize dog sniffs of random populations. Indeed it has not permitted the unwilling to be subjected to dog sniffs unless there has been, at least, a showing of individualized suspicion. *United States v. Place*, 462 U.S. 696, 706-08 (1983). The cases reported in the lower courts reveal that this Court should not permit the use of drug dogs absent individualized suspicion as the rate of false positives on a random population will lead to an intolerably high number of fruitless searches.[4]

Dogs are quite unreliable in indicating the presence of drugs in cars seized at roadblocks. In a roadblock in Florida, similar to the one in the instant case, the accuracy of the dogs was enhanced by requiring two separate dogs to alert on an automobile before a search could proceed. *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995). All cars on the Florida highway were stopped and drug detection dogs sniffed the outside of the cars while officers checked the license and registration of the motorists. *Id.* When a dog indicated the presence of narcotics, a second dog was brought to the automobile. Only if both the first and second dog alerted did a search occur -- consent was requested for a search on the second canine alert, if consent was not given, a warrant was obtained. Of the twenty eight cars searched using this method, only one search resulted in the arrest of a motorist for possession of illegal narcotics. *Id.* Thus, the alert of one drug detection dog -- confirmed by the positive alert by a second drug detection dog -- yielded fruitless searches in 27 out of 28 cases. *Id.* In other words, a roadblock, using a procedure even more carefully designed than the one in the

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[4] Certainly dog sniffs at airports and international borders would go unaffected by a reasonable suspicion prerequisite to a sniff as the full search permitted by a positive alert is permitted of any commercial airline passenger, *see National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (citing *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir.1974)), or international traveler. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971).

instant case, resulted in the search of an innocent person's car 96.4% of the time.

The use of dogs in school setting have similarly produced unreliable results when used on a population officers have no reason to suspect. In *B.C. v. Plumas Unified School District*, 192 F.3d 1260 (9th Cir. 1999), dogs were used to sniff high school students. Though there were positive indications by the drug dogs on students, no drugs were ever found. *Id.* at 1263. The false positive rate was therefore 100 percent.

In *Doe v. Renfrow,* 475 F. Supp. 1012 (N.D. Ind. 1979), *aff'd in part and remanded in part*, 631 F.2d 91 (7th Cir. 1980), students were randomly sniffed by narcotics dogs for drugs. Fifty positive indications by drug-detection dogs yielded only seventeen instances of actual narcotics possession. Thus, the police found no drugs on thirty-three individuals on whom the dogs alerted. On this random sample, the dogs were accurate in their alerts less than thirty-four percent of the time.

The fear of false positives when dogs are used on a random population is therefore very real.

> The judiciary should be most skeptical of sniffs conducted in a random, unfocused manner. All but the most carefully planned random sniffs using highly trained dog teams will likely result in many false positives.

Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.2(f), 63 n. 265.1 (quoting Bird, *supra*, 433-34).

Limiting dog sniffs to situations where officers have reasonable suspicion of the presence of narcotics reduces the number of fruitless searches the cases in the lower courts reveal to be all too common.

C. Many State Courts and Commentators Have Called for a Showing of Reasonable Suspicion Before a Dog is Permitted to Sniff

Lower courts have typically permitted dog sniffs only in cases where officers had reasonable suspicion to believe narcotics present before beginning the dog sniff. *See* LaFave, *supra,* at § 2.2(f), 456 (noting that with rare exceptions, courts have approved of dog sniffs only where reasonable suspicion existed that narcotics would be found in the place sniffed.) In cases where dog sniffs have been performed in the absence of reasonable suspicion, lower courts have approved the use of dogs primarily, if not exclusively, on closed containers or luggage at airports or other places where government inspection is anticipated. *People v. Unruh*, 713 P.2d 370, 377 (Colo. 1986) (*en banc*) (citing cases); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (citing *United States v. Edwards,* 498 F.2d 496, 500 (2d Cir. 1974) (recognizing that all commercial airline passengers may be searched absent individual suspicion)).

The Pennsylvania Supreme Court, not unlike many other state courts, [5] has regarded a dog sniff to be a search

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[5] Several other state courts have arrived at the same conclusion under their respective state constitutions. *See Pooley v. State*, 705 P.2d 1293, 1310-11 (Alaska App. 1985); *State v. Pellici*, 580 A.2d 710 (N.H. 1990); *People v. Unruh*, 713 P.2d 370 (Colo. 1986)(*en banc*). As many commentators have noted, this Court's decision in *Place* did not resolve the issue of whether a drug dog may be set loose on a citizen or his property absent suspicion of wrongdoing. *See* LaFave, *supra*, at § 2.2(f), 456. These from various state courts either make that assumption or

under the state constitutional protection against unreasonable searches and seizures. *Commonwealth v. Johnston*, 530 A.2d 74 (Pa. 1987). Like other state courts, the Pennsylvania Supreme Court recognized that permitting a dog sniff only where officers had probable cause to believe drugs present would render the canine sniff of marginal utility at best. *Id.* at 79. The Court therefore recognized that probable cause was an inappropriate standard for dog sniffs but held that "a free society will not remain free if police may use this, or any other crime detection device, at random and without reason." *Id.* Because the dog sniff was "inherently less intrusive than other searches," the Court found the appropriate balance between the needs of criminal enforcement and individual's freedom from unwarranted criminal investigations to be struck by the prerequisite of reasonable suspicion. "[A]n individual's interest in being free from police harassment, annoyance, inconvenience and humiliation is reasonably certain of protection if the police must have a reason before they may... utilize a dog." *Id.* at 80.[6]

Many commentators have similarly labeled the dog sniff an investigative technique which subjects its targets to a humiliation and potentially offensive police encounter. Recognizing nevertheless that the intrusion is minimally intrusive, these commentators analogize the encounter to a *Terry* stop, another investigative technique that subjects a citizen to a potentially undesirable encounter. *See* LaFave, *supra*, § 2.2(f), 461; Note, Kenneth L. Pollack, *Stretching the* Terry *Doctrine to the Search for Evidence of Crime: Canine*

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recognize the reasonable suspicion requirement irrespective of the federal minimum.

[6] The Court noted that a dog sniff was "unlikely to intrude except marginally upon innocent persons." *Id.* at 79-80. To the contrary, when drug dogs are used on a random population, as discussed above, the cases litigated in the lower courts indicate frequent intrusions on innocent persons.

Sniffs, State Constitutions and the Reasonable Suspicion Standard, 47 Vand. L. Rev. 803 (1994).

Requiring reasonable suspicion as a prerequisite to a dog sniff is that it reduces the risk of a false positive and does not subject an innocent citizen to the accusational nose of a police dog without a basis.

III. THE INDIANAPOLIS ROADBLOCK DOES NOT ADEQUATELY LIMIT THE DISCRETION OF POLICE OFFICERS.

Where suspicionless automobile seizures have been permitted, this Court has required a limitation on officer discretion at the roadblock so that officers may not arbitrarily decide how invasive the intrusion shall become or arbitrarily subject some to the initial seizure but not others. *See Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450-51 (1990) (all cars entering roadblock must be checked in same manner); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (recognizing that roadblock where all cars were briefly stopped to ensure licensure could be reasonable intrusion).

The directives to officers performing the Indianapolis Drug Interdiction Roadblock do not adequately supply guidelines that assure equal treatment of all stopped motorists. Neither the directives to officers running the roadblock nor the affidavits the City of Indianapolis presented to the District Court provide adequate assurances that all motorists are equally likely to be seized in the checkpoints.

A. The Directives Do Not Adequately Limit the Extent or Manner of Investigation Officers May Perform at the Checkpoint.

The directives to officers operating the Indianapolis roadblocks further reveal that an indication by a trained drug dog is not the only way an officer may gain the right to search a motorist's car. The directives note that a motorist's voluntary consent to search will permit a search, even without a positive indication by the drug dog.[7] Probable cause can be developed during the officer's interaction with the motorist even absent a positive indication by a drug dog. As the directives read:

> A warrantless search of a vehicle is permitted if the person in control of the vehicle gives a valid consent to search. The officer may not overbear the will of the person consenting. . . .
>
> A warrantless search of a vehicle is also permitted if the officer has probable cause to believe the vehicle contains contraband, evidence, or fruits of a crime.

App. of Pet. Brief at 53a.

In a regulatory search, a search for non-criminal purposes, officials will stop when the inspection is complete -- an intrusion circumscribed by a clear goal. The inspection is complete when the wiring of a dwelling has been

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[7] While this Court has recognized that a voluntary consent to search a car permits an officer to conduct a search, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 227-34 (1973), this Court has never permitted a suspicionless seizure so that the officer may request consent of the seized motorist.

examined, *see Camara v. Municipal Court*, 387 U.S. 523 (1967), or when the vehicle identification numbers of cars at a vehicle dismantling plant have been examined. *See New York v. Burger*, 482 U.S. 691 (1987). "[B]ecause the inspections are neither personal in nature nor aimed at the discovery of evidence of a crime, they involve a relatively limited invasion of the... citizen's privacy." *Camara,* 387 U.S. at 537.

A search for evidence of criminal activity is necessarily less circumscribed -- there is no discrete place where all citizens place incriminating evidence or contraband. The intrusion by the state in these circumstances is simply greater than when a clearly defined regulatory task is being performed. No direction is provided to the officer indicating when he may ask the motorist to consent or what sort of questions he may ask in his efforts to obtain probable cause by some means other than a canine sniff. Admittedly the directives instruct the officers that "all *cars* are to be examined in the same manner." Directives, App. of Pet. Brief at 54a. The directives nevertheless expressly state that the officer may obtain consent to search the vehicle or search the vehicle when he has probable cause -- the methods by which the officer may attempt to develop probable cause are not limited by the directives. The directives do not tell the officer whether he is to seek consent to search from all motorists, some or none. The directives do not instruct the officer on the questions or statements he can or should use to obtain consent or the questions he can or should ask of motorists in an attempt to develop probable cause.

If consent is given or probable cause discovered, a very intensive search ensues -- an intrusion not visited on those from whom officers do not seek consent or attempt to develop probable cause. The search of a car for drugs could, and often does, involve removing floor mats, spare tires, and door panels. *See United States v. Zapata*, 180 F.3d 1237,

1243 (11th Cir. 1999) (consent to search car for weapons or drugs permits removal of door panels); *United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990) (finding consent to "look in" a car allowed officer to remove door panels); *United States v. McRae*, 81 F.3d 1528, 1537-38 (10th Cir. 1996) (finding consent to "look in" a car included lifting carpet in the trunk); *United States v. Gigley*, 213 F.3d 509 (10th Cir. 2000) (consent to "look in" van permits officers to look under rear middle seat).

The goal of the police is not a search tailored to a regulatory goal such as an examination of the driver's license. The admitted purpose is the discovery of drugs which may be hidden anywhere in a car. The directives to Indianapolis police officers operating these drug interdiction roadblocks permit these very intrusive searches to be sought of some but not others -- with no basis for the differentiation.

B. The Directives Do Not Adequately Limit the Discretion of Law Enforcement Officials Determining Where the Roadblocks Shall Be Placed.

The Fourth Amendment establishes a warrant requirement which is waived only when significant exigencies prevent obtaining a warrant. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The fact that a search or seizure may occur on something less than (or, more precisely, *other* than) probable cause, does not eliminate the warrant requirement in the absence of an exigency. *See Camara v. Municipal Court*, 387 U.S. 523 (1967); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). The location of a roadblock therefore should require the same sort of judicial approval required when the government seeks a suspicionless regulatory intrusion.

The instant case provides a classic example of the need for judicial supervision of the investigatory process. The City of Indianapolis asserts that supervisory level officials determine the location of the roadblock in advance. Affidavit of Marshall Depew, App. 57a. The determination is to be made based on crime rates and extent to which the location will affect traffic. *Id.*

The point of a roadblock -- as opposed to random suspicionless stops of motorists -- is that a cross-section of the community is subjected to the same intrusion. *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) (requiring stop of all automobiles if suspicionless seizure is sought). Officers may not target individual motorists or groups of motorists without suspicion. *Id.* If all persons are equally subject to the same chance of a seizure at a checkpoint, the powerful and the outcast, then the decision of whether a short seizure is a good policy can be entrusted to the political process. Those who legislate and influence police policy are as likely to be seized by a checkpoint as anyone else. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19, 93 (1988) (arguing that Fourth Amendment provides for equal protection from searches and searches so that democratic process will be responsive to claims that intrusions applicable to all are bad policy).

Where police officers, even at the supervisory level are permitted to establish the checkpoint's location, they can place the checkpoint in an area that lacks influence. Further, nothing in the stipulations entered in the District Court prevents the checkpoints from being operated in precisely the manner the Respondents alleged in their complaint. A sign along the highway warns of a drug checkpoint further down the highway while the actual checkpoint is discretely hidden at the bottom of the next exit ramp. J.A. at 8. Those with something to hide from authorities naturally exit.

The supervisory officer can select a community that lacks political influence and corral those with drugs off the interstate onto the exit ramp leading to this community. A high hit rate generated, not by the community's indigenous drug problem, but by the signs alerting drug carriers of the impending roadblock, confirms that the supervisory officer has correctly located a "high crime area."

This Court has continued to require a warrant for intrusions that can be conducted without a warrant to ensure that regulatory agencies follow standard, non-discriminatory procedures in all cases. *See Camara v. Municipal Court,* 387 U.S. 523 (1976); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). Drug interdiction roadblocks have the potential to be allocated based on hunches about segments of the community and drug use -- hunches that will subject perfectly innocent citizens to intrusions on their liberty because of their race or class -- intrusions wealthier communities are less likely to experience. The location of this type of suspicionless intrusion is therefore especially appropriate for judicial supervision.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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18